UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, D.C. 20001

DATE: June 27, 1997

CASE NO.: 95 INA 122

In the Matter of:

INTEPLAST CORPORATION,
Employer,

on behalf of

Yie-Hwa Alice Lee,
Alien

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Yie-Hwa Alice Lee (Alien) by Inteplast Corporation (Employer) under § 212(a)(5) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On July 29, 1993, the Employer filed an application for labor certification to enable the Alien to fill the position of "Environmental Engineer." AF 05. The job duties for the position in question were as follows:

> Employee will review, interpret and analyze the effect of Federal, State and local air related environmental regulations on employer's manufacturing facilities, with emphasis upon the Clean Air Act. Employee will research information and prepare policies and procedures to comply with Federal, State and local air and water environmental regulations. Employee will audit and inspect employer's facilities for compliance with Federal, State and local air environmental regulations and report on findings. Employee will prepare training programs to train employer's plant employees on compliance with environmental and safety regulations. Employee will prepare project specifications and manage projects at employer's facilities.

A Master's Degree in environmental engineering, two years of experience in the job offered, and Chinese (Mandarin) language were the educational and other requirements for the position offered.

Notice of Findings. On May 31, 1994, The CO issued a Notice of Findings (NOF) in which the Employer was advised that certification would be denied, subject to rebuttal of the following objections: (1) that the Master's Degree requirement appeared to be restrictive and excessive,[2] and (2) the foreign language requirement was not established as a business necessity under 20 CFR § 656.21(b)(2). Employer was advised that it could delete the foreign language requirement or document that it was a business necessity. The following documentation was requested to justify the language requirement as a business necessity: (1) the

[2]This was satisfactorily rebutted and was eliminated in the Final Determination.

total number of clients/people the Employer deals with and the percentage of those people who cannot communicate in English; (2) the percentage of Employer's business that is dependent upon the language, also documenting the dollar amount of the business that is dependent upon the foreign language in 1993 and 1994 to date; (3) how the absence of the language capability would adversely impact the business; (4) the percentage of time the worker would use the language, relating the percentage to the duties of the job described; (5) describe how Employer has dealt with and handled Chinese (Mandarin) speaking clients previously or is currently doing so; documenting the language abilities of other workers and their titles and job duties; (6) describe the services provided by Employer to other ethnic groups and how the language problem is handled; and (7) any other documentation which would clearly show that fluency in Chinese (Mandarin) is essential to Employer's business.

Rebuttal. Employer's rebuttal consisted of two letters from its Corporate Personnel Director, dated June 27, 1994, and July 1, 1994, plus attachment exhibits. AF 78. Five pages of the attachments appear to be facsimile messages from Taiwan, with no translations included. AF 63-67. Two of these items are sent to the attention of the Alien.

The Employer argued that the foreign language requirement was essential, explaining that it is an affiliate company of a corporation which has forty years of plastics manufacturing experience in Taiwan. Most of Employer's manufacturing processes are related to plastic, and "since most of the technical information and operation experience are supported from Taiwan, the translation of such information and interpretation from the engineering crew from Taiwan are requested in our new plant." Employer argued that the person who would be employed in the position at issue, would frequently deal with overseas communication, and be required to translate from Chinese to English to investigate whether any production process should be modified in order to comply with U.S. standards, since the regulations and control standards of Taiwan are different from the United States standards.

Final Determination. Finding the rebuttal unpersuasive, the CO issued a Final Determination (FD) denying certification on July 18, 1994. AF 83. The CO accepted the Employer's response as to its requirement of a Master's Degree in Environmental Engineering.

The CO rejected the argument as to the restrictive language requirement in which the Employer contended that its affiliation with a Taiwanese plastics company was the reason that the language requirement was a business necessity. The CO further observed that none of the requested documentation supporting the

business necessity of the language requirement had been submitted. Moreover, said the CO since the documents Employer had submitted in Chinese had not been translated, their relevance was not clear.

Appeal. On August 1, 1994, Employer filed its request for Reconsideration together with its appeal of the denial of certification. AF 93. The CO denied Employer's Request for Reconsideration, and referred its request for review for action. AF 94.

DISCUSSION

20 CFR § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or included in the Dictionary of Occupational Titles unless it establishes the business necessity of the requirement.

Employer can establish a business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of the Employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the Employer. **Information Industries, Inc.**, 88-INA-82 (Feb. 9, 1989)(en banc). Vague and incomplete rebuttal documentation will not meet the employer's burden of establishing business necessity. **Analysts International Corporation,** 90-INA-387(July 30, 1991). Although the CO fully advised Employer of the documentation it would need to meet the requirements of 20 CFR § 656.21(b)(2), the Employer failed to provide the documentation specified in the NOF.

In **Hudson Development & Construction Corp.**, 92-INA-33 (Feb. 16, 1993), employer failed to establish business necessity for a foreign language requirement that was requested by the CO, who observed that the employer had, "[S]ubmitted no evidence addressing the number or percentage of clients who are dependent on the Korean language and cannot communicate in English, how absence of the language would adversely impact on its business, nor how the Employer has dealt with and handled Korean speaking clients previously." The evidence in the instant case requires the same result, as this Employer failed to submit any of the evidence that the CO requested in support of its foreign language requirement. While some documentation has been submitted in the Chinese language, the Employer's business necessity cannot be established through untranslated foreign language documentation. **English Language Enterprises**, 88-INA-295 (Nov. 28, 1989).

ORDER

For these reasons the Certifying Officer's denial of labor certification is Affirmed.

For the Panel:

_____

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO.: 95-INA-122

INTEPLAST CORPORATION, Employer,
Yie-Hwa Alice Lee, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: June 9, 1997